

**Docket No.:** 02-0455  
**Bench Date:** 09-11-02  
**Deadlines:** 09-24-02 and 09-25-02

## **M E M O R A N D U M**

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**TO:** The Commission

**FROM:** William J. Showtis, Administrative Law Judge

**DATE:** September 9, 2002

**SUBJECT:** Commonwealth Edison Company

Verified Emergency Petition for a Declaratory Ruling determining Commonwealth Edison Company's obligations under the provisions of Article IX of the Public Utilities Act, including 220 ILCS 5/9-102, 103, 104, 201, 240 and 241, to pay under ComEd's Rider 3-Qualified Solid Waste Energy Facility Purchases to Resource Technology Corporation for purchases of energy from Resource Technology Corporation's facility at 14732 East 2100 North Road, Pontiac, Illinois in quantities that are in excess of that facility's 10 MW configured capacity specified in the Commission's Order in Docket 97-0034 dated October 8, 1997 or for other relief.

**RECOMMENDATION:** Deny Resource Technology Corporation's ("RTC") emergency petition for stay of the Commission's September 24, 2002 Order, and deny the emergency applications for rehearing filed by RTC and by Banco Panamericano, Inc., Chiplease, Inc. and Leon Goldblatt.

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On September 4, 2002, the Commission entered an order (the "Order") in this docket which approved ComEd's request for a declaratory ruling. The Order concluded that ComEd is not obligated to pay under any provisions of the Public Utilities Act to pay the retail rate under its Rider 3 for energy generated at RTC's facility located at 14732 East 2100 North Road, Pontiac, Illinois (the "Pontiac facility") that is in excess of 10 MW.

On September 4, 2002, RTC filed an emergency petition for stay and an emergency application for rehearing. On September 5, 2002, Banco Panamericano, Inc., Chiplease, Inc. and Leon Goldblatt (collectively hereinafter referred to as the "Creditors") filed a pleading which stated that they join in RTC's emergency petition for

stay. On September 5, 2002, the Creditors also filed an application for rehearing and a supplement to that application.

On September 6, 2000, ComEd and Commission Staff ("Staff") filed responses to RTC's emergency petition for stay. On September 9, 2002, RTC filed a reply to those responses.

### EMERGENCY PETITION FOR STAY

#### RTC's Petition

RTC requests that the Commission stay the effect of the Order until the Commission rules on RTC's application for rehearing. RTC asserts that the test to be applied in determining whether to grant the stay is whether RTC has made a clear case of hardship or inequity that would result from the Order. Landis v. North American Co., 57 S. Ct. 163, 165, 81 C. Ed. 153, 158 (1936) RTC indicates that during its proceeding before the United States Bankruptcy Court for the Northern District of Illinois, it presented testimony that it would suffer irreparable injury if its sales of electricity from the Pontiac facility to ComEd at the retail rate under ComEd's Rider 3 were limited to 10 MW. RTC notes that its testimony indicated that it would lose approximately \$500,000 per month with such a limitation, and would be unable to pay its debt service on the Pontiac facility, which was cross-collateralized with other financing loans to it. RTC further notes that its testimony indicated that a default on the loan for the Pontiac facility would adversely affect its relationship with its lender with respect to other qualified solid waste energy facility ("QSWEF") sites and would prevent the further development of those projects. RTC states that its testimony concluded that limiting the application of the retail rate to 10 MW would have a disastrous effect on it as an operating entity, and on its ability to reorganize in the pending Chapter 11 bankruptcy proceeding and make distributions to its unsecured creditors, including the State of Illinois.

RTC asserts that neither ComEd nor Staff have indicated that any immediate harm will be incurred either by the State of Illinois, which will be reimbursed for all tax credits claimed by RTC within the time period permitted by statute, or by ComEd, which will be reimbursed for any Rider 3 rates it pays to a QSWEF through tax credits.

RTC indicates that it is also necessary to consider whether the stay is necessary to preserve the status quo. RTC states that uncontroverted testimony as to adverse financial consequences establishes the necessity of preserving the status quo. Douglas Transit, Inc. v. Illinois Commerce Commission, 145 Ill. App. 3d 115, 99 Ill. Dec. 173 (1986)

In requesting a stay, RTC notes that its application for rehearing cites jurisdictional, constitutional and procedural bases for reversing the Order.

### ComEd's Response

ComEd indicates that a party requesting a stay must demonstrate (1) the likelihood of prevailing on the merits, (2) that irreparable harm will result if the stay is not granted; and (3) that the harm to other parties that would result from the stay is outweighed by other factors. City of Chicago v. Illinois Commerce Commission, 133 Ill. App. 3d 435, 450, 471 N.E. 2d 1369, 1380 (1st Dist. 1985); Commonwealth Edison Co., ICC Docket Nos. 87-0427, et. al. (consol.), 1993 Ill. PUC LEXIS 21, \*2 (January 8, 1993) ComEd asserts that RTC fails to meet its burden with respect to all three factors.

ComEd states that RTC has failed to address whether there is a likelihood that it will prevail on the merits. ComEd indicates that the Order is well-reasoned and disposed of the arguments raised by RTC and the Creditors.

ComEd indicates that there is no harm to RTC as a result of the Order. ComEd states that RTC remains eligible for and continues to receive ComEd's Rider 3 prices for capacity from the Pontiac facility up to 10 MW. ComEd states that RTC is receiving everything it is entitled to under the Public Utilities Act ("Act") and the Commission's Order in consolidated Docket Nos. 97-0031 through 97-0045, which granted QSWEF status to the Pontiac facility.

ComEd asserts that contrary to RTC'S suggestion, the Order does not change the status quo among the parties. ComEd states that the Order reaffirms the scope of the Pontiac facility's original and currently effective QSWEF determination, and does not impose any new or additional conditions on RTC's entitlement to Rider 3 payments. ComEd states that the Order correctly concluded:

The record indicates that prior to its substantial expansion of the Pontiac facility, RTC was notified by Staff that it needed to seek formal QSWEF approval from the Commission for its plan to add capacity above 10 MW . . . . The substantial expansion and reconfiguration of the Pontiac facility after the Commission's Order in consolidated Dockets 97-0031 through 97-0045 has resulted in QSWEF status for the originally configured 10 MW and non-QSWEF status for the remaining output of the facility. RTC's decisions and actions caused this result.

Finally, ComEd indicates that the balance of harms does not favor a stay. ComEd states that there is no harm to balance since RTC will continue to receive the Rider 3 payments to which it is entitled under the Act and the Commission's Order in Docket No. 97-0034.

### Staff's Response

Staff notes that one of the purposes of seeking a stay is to preserve the status quo. Staff indicates that the Commission's Order in consolidated Dockets 97-0031 through 97-0045 found that the Pontiac facility would have a capacity of 10 MW, based

on the evidence presented by RTC. Staff states that before RTC took action in 2001 to expand the generating capacity at the Pontiac facility that it now seeks to protect by the stay, RTC was advised by Staff that it had no authority under the 1997 Order to expand the facility. Staff asserts that RTC knew that it needed to seek additional authority from the Commission to generate more than 10 MW for sale at ComEd's Rider 3 rates. Staff states that an injunction should not issue when such investments are made with knowledge of the law, without attempting to obtain the proper authority. Sinclair Refining Co. v. Chicago, 246 Ill. App. 152. Staff asserts that RTC should not be permitted to take advantage of its wrongful conduct. Staff concludes that there is no right to preserve a status quo that is improperly created by RTC.

Staff also indicates that a stay would not effect the Order in consolidated Dockets 97-0031 through 97-0045, which states that the Pontiac facility will be sized at 10 MW.

Staff further states that if the Commission denies RTC's application for rehearing, RTC's petition for stay becomes moot and should be denied on that basis.

#### RTC's Reply to the Responses of Staff and ComEd

RTC contends that it has met each of the requirements for a stay. RTC asserts that it has demonstrated the likelihood of success on the merits. RTC states that it has pointed out that the Commission has no authority under the Public Utilities Act to limit the amount of electricity generated by a QSWEF that is subject to the favorable Rider 3 retail rates from a public utility. RTC indicates that the Act provides that the public utility shall pay favorable retail rates to a QSWEF for the purchase of electricity generated by a QSWEF from landfill generated methane gas.

RTC also indicates that if the Commission's position is that it has the discretion to set capacity limits on the amount of electricity generated by a QSWEF that is subject to the favorable "retail rate," the Commission has failed to note the standards for the exercise of such discretion that are required by Section 5-20 of the Illinois Administrative Procedure Act (5 ILCS 100/5-20).

RTC states that it has presented uncontroverted evidence of the irreparable harm it will suffer absent a stay. RTC asserts that fairness and equity require that a stay be granted until the Commission determines whether a rehearing will be granted, or the 20 day deadline for ruling on the petitions for rehearing expires, or the Commission enters an expedited order on the petition for rehearing.

RTC disagrees with ComEd's position that the Order does not change the status quo among the parties. RTC indicates that FERC approved the increase in the capacity of the Pontiac facility to 35 MW. RTC asserts that the Order decreases the FERC approved capacity of 35 MW to 10 MW without notice of wrong-doing, without overturning FERC approval, and without any rule requiring any action other than compliance with FERC. RTC asserts that ComEd has at all times paid the Rider 3 rates for all electricity which the Pontiac QSWEF generated. RTC states that limiting the

applicability of the Rider 3 rates to 10 MW of electricity will result in ComEd paying \$500,000 less each month to RTC for the purchase of electricity generated by the Pontiac QSWEF.

In response to Staff's assertion that Staff advised RTC that RTC had no authority under the Commission's Order in consolidated Dockets 97-0031 through 97-0045 to expand the capacity of the Pontiac facility above 10 MW, RTC indicates that Staff does not have the authority to give binding directives. RTC states that Staff's reliance on Sinclair is improper since there is no law which states that RTC is bound to a capacity of 10 MW for the Pontiac facility.

### Conclusion

I recommend that the emergency petition for stay be denied. The Order reached the correct conclusion. RTC has not demonstrated the likelihood of success on the merits.

### APPLICATIONS FOR REHEARING

RTC's application for rehearing indicates that rehearing should be granted for the following six reasons: (1) the Order failed to consider the prejudicial effect the emergency proceeding had on RTC and the Creditors; (2) the Order disregarded the Commission's Rules of Practice, which requires that each party be granted a full and fair opportunity to complete fact finding and that the Order include specific findings of fact and law, including a basis for the Commission's jurisdiction over ComEd's petition; (3) the Order violated the express language of the Public Utilities Act by setting maximum wattage capacities outside the scope of Section 8-403.1 and thereby interfered with the express duties of the legislature; (4) the Order discriminated against RTC and its Pontiac facility by "splitting" the statutory rights it is owed as a QSWEF and setting arbitrary limits on the amount of electricity that must be purchased at the "retail rate" from a facility determined to be a QSWEF; (5) the Order's setting of arbitrary limits on the amount of electricity that must be purchased under the Retail Rate Law from a facility determined to be a QSWEF violates the purpose of Section 8-403.1, which is to "encourage the development of alternative energy production facilities in order to conserve [the State's] energy resources and to provide for their most efficient use", and (6) the Commission does not have any authority to set limits to set limits on the MW capacity of a QSWEF facility that are lower than the 80 MW limitation for small power production facilities specified under federal law (18 C.F.R. 292.204(a)).

RTC requested that the Commission grant its emergency application for rehearing within five days of its receipt by the Commission.

In their application for rehearing, the Creditors assert the following: the Order erred in finding that (1) the Commission's Order in consolidated Dockets 97-0031 through 97-0045 imposed a 10 MW limit on the QSWEF status for the Pontiac facility; (2) the Commission possesses authority to set wattage limits on individual QSWEFs

such as the Pontiac facility; (3) ComEd and Staff are not estopped from seeking the relief sought by ComEd. In the supplement to their application for rehearing, the Creditors also contend that even if the Commission possesses the discretionary authority to set wattage limits for the QSWEF status of the Pontiac facility, the Order failed to specify the standards for such authority in violation of Section 5-20 of the Illinois Administrative Procedure Act (5 ILCS 100/5-20). The Creditors note that Section 5-20 provides:

Each rule that implements a discretionary power to be exercised by an agency shall include the standards by which the agency shall exercise the power. The standards shall be stated as precisely and clearly as practicable under the conditions to inform fully those persons affected.

I disagree with the contentions of RTC and the Creditors. I recommend that the applications for rehearing be denied.

WJS/lw